

BEFORE THE **ORIGINAL FILE** **ORIGINAL RECEIVED**  
Federal Communications Commission

WASHINGTON, D.C.

JAN 4 1993

In the Matter of )

Implementation of the Cable )  
Television Consumer Protection )  
and Competition Act of 1992 )

MM Docket No. 92-259

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

**COMMENTS ON RULEMAKING RELATING TO MANDATORY  
TELEVISION BROADCAST SIGNAL CARRIAGE OF  
INTERNATIONAL FAMILY ENTERTAINMENT, INC.**

International Family Entertainment, Inc. ("IFE"), in response to the Commission's Notice of Proposed Rule Making ("NPRM") in the above captioned proceeding (released November 19, 1992), hereby files its comments concerning regulations to implement the mandatory television broadcast signal carriage and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act").

**A. IFE's Interest in this Proceeding**

1. IFE is a Delaware corporation which owns and operates The Family Channel, a 24-hour per day cable television network that is primarily distributed through cable television systems throughout the United States. The Family Channel was originally launched in April 1977 as CBN Satellite Network. The Family Channel provides family-oriented entertainment, including original made-for-television movies, dramatic and comedy series,

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classic westerns, specials, inspirational programs, and children's programming.

2. IFE has publicly announced plans to launch a new cable program network, The Game Channel. The Game Channel is contemplated to be a 24-hour per day cable program network distributed primarily through cable television systems. As proposed, the new channel's programming will consist of previously produced as well as newly produced game shows that include an interactive element allowing viewers to participate.

3. As the owner and operator of a cable network, and as an entity that plans a novel new cable network, IFE is directly affected by the must carry and retransmission consent provisions of the Cable Act and by any regulations that the Commission may adopt to implement those provisions. Specifically, IFE is affected because the must carry and retransmission consent provisions confer a privileged status on commercial and noncommercial broadcast signals which are competitors of IFE for scarce channel slots on cable systems throughout the country.

**B. The Must Carry and Retransmission Consent Provisions are Unconstitutional**

4. IFE is a plaintiff in Turner Broadcasting System, Inc. v. FCC, C.A. #92-2247 (D.D.C.) ("TBS v. FCC"). IFE seeks in that lawsuit, inter alia, to enjoin the FCC from enforcing the mandatory television broadcast signal carriage and retransmission consents provisions of the Cable Act. Those provisions confer an unconstitutional privilege on a favored class of speakers at the expense of disfavored cable network speakers such as IFE, and

therefore violate IFE's rights under the Free Expression Clause of the First Amendment to the United States Constitution. The detailed must carry provisions in the Cable Act are in many respects even more expansive than the rules already invalidated as unconstitutional in Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988) and in Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986). The Commission is referred to the district court record in TBS v. FCC for a full statement of the reasons that the mandatory television broadcast signal carriage and retransmission consents provisions are unconstitutional.

5. For reasons also stated in the record in Turner v. FCC, IFE will suffer irreparable injury if the FCC is permitted to enforce the mandatory television broadcast signal carriage and retransmission consents provisions of the Cable Act. Nothing that the Commission does in designing implementing regulations can cure the Cable Act's constitutional defects or prevent irreparable injury to IFE's rights as a speaker under the First Amendment.

**C. Must Carry Regulations for Noncommercial Television Stations**

6. The Cable Act's requirement that certain noncommercial educational ("NCE") television stations are entitled to must-carry privileges on certain cable systems threatens IFE's ability to increase diversity on cable systems through new cable networks such as The Game Channel. Cable systems' channel capacity has

become increasingly scarce since the must carry requirements were invalidated in Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, 486 U.S. 1032 (1988). The development of new, diverse programming services has heightened the already fierce competition for channel capacity and made it difficult for IFE and others to obtain carriage for new networks such as The Game Channel. The Cable Act's must carry provisions for NCEs -- and any regulations thereunder -- will provide the noncommercial broadcast industry with a substantial economic advantage over cable networks like The Family Channel, and thus make it even more difficult for novel networks like The Game Channel to have a fair chance in the market.

7. There is no legitimate justification for favoring the NCEs over IFE and other speakers, especially when the means involved disregard the viewing preferences of the public. No regulations issued by the Commission can cure the constitutional infirmity of the discrimination in favor of NCE's under the Cable Act. Nonetheless, if the Commission must act to promulgate regulations prior to a definitive court ruling that must carry and retransmission consent are unconstitutional, it should at least attempt to issue regulations that will make the intolerable competitive advantage to NCEs as small as possible.

8. The Commission's regulations concerning mandatory carriage of NCE's should, to the extent possible, maximize the opportunities for other entities such as IFE to provide diversity and choice in television service available on cable systems. The Commission has stated that it is in the public interest to

encourage such diversity. E.g., In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 F.C.C. Rcd 864, 879 (November 28, 1986).

9. As part of an attempt to permit diversity, the Commission should use the strictest possible criteria to determine whether a particular NCE station "transmits predominantly noncommercial programs" and is therefore entitled to a must carry privilege under the Act. (See NPRM ¶8). The Commission should impose a far more stringent standard than is proposed in ¶8 of the NPRM (i.e., 50 percent of a broadcast week devoted to noncommercial educational programming) in order for an NCE station to qualify for a privilege that will limit the market's ability to produce program diversity.

10. In order to further limit privileges that will decrease diversity, the Commission should broadly construe the exceptions from must carry requirements for multiple NCE's with "substantially duplicated" programming. (See NPRM ¶12). The Commission should impose a standard far lower than the one proposed in ¶12 of the NPRM, i.e. that the exception apply only if 50 percent of weekly prime time programming is the same on multiple NCE's. Diversity and consumer preferences will be further damaged if cable owners are required to devote scarce channel capacity to two NCE's with, for example, schedules that are 30 percent identical, at the expense of a novel cable channel such as The Game Channel.

D. Carriage of Local Commercial Television Stations

11. The Cable Act's must carry requirements for commercial television stations also confer an unconstitutional privilege on a class of favored speakers at the expense of disfavored speakers such as IFE, and thus violate IFE's rights under the First Amendment. No regulations issued by the Commission can cure this infirmity. Again, however, if the Commission must act to issue regulations prior to a definitive court ruling that the must carry and retransmission consent provisions are unconstitutional, it should at least try to make the intolerable competitive advantage to local commercial stations as small as possible.

12. The Commission should define a cable system's market as narrowly as possible in an effort to reduce must carry obligations for "local" commercial stations. (See NPRM ¶¶18-20). In this regard, the Commission should, as it suggests in ¶20 of the NPRM, impose a specific, mileage limitation equal to various stations' Grade A contours; there is no reason that stations which cannot be viewed over-the-air, and which therefore have little or no link to a cable system's community, should be accorded must carry privileges.

13. To further limit privileges that will hurt diversity, the Commission should narrow the number of "local" stations covered by must carry by defining as broadly as possible the term "network affiliate" and the concept of programming duplication that it incorporates. (See NPRM ¶26). The Commission's objective should be to avoid requiring cable systems to devote scarce channel capacity to two commercial stations with, for

example, schedules that are 10 percent identical, at the expense of viewer's ability to have a new cable channel such as The Game Channel.

14. Similarly, the regulations should define the requirements to carry low power television ("LPTV") stations as narrowly as possible. A specific mileage limit of Grade A equivalent should be established, with additional restrictions based on county and state boundaries, as well as the limits of cable systems' franchise territories if they are smaller than individual counties. (See NPRM ¶29). To the extent possible, viewers should have access to novel networks such as The Game Channel, rather than be forced to have limited options because of an unconstitutional privilege bestowed on LPTV's by Congress.

**E. Provisions Applicable to Commercial and Noncommercial Stations**


15. The Cable Act's requirements for channel positioning (see NPRM ¶33) are particularly offensive to IFE. Channel positioning is extremely important to the success of The Family Channel. For that reason, IFE offers a 15 percent rebate of license fees to cable systems that carry The Family Channel on channels 2 through 20. Despite the rebate, cable systems are already shifting The Family Channel from its established positions on channels 2 through 20 to new channel positions above channel 20. Comparing cable systems that carried The Family Channel during the third quarter of 1992 and during the first quarter of 1992, approximately 155,000 fewer cable subscribers received The Family Channel on channels 2-20.

16. The Cable Act exacerbates this problem. By mandating where broadcast signals must be carried, the Cable Act further forecloses IFE from desirable cable systems channel. There is no justification whatsoever for the unconstitutional privilege bestowed on commercial broadcast signals.

**F. Conclusion**

For reasons stated in the record in TBS v. FCC, the must carry and retransmission consent provisions in the Cable Act are unconstitutional. IFE makes the comments contained herein because the Commission may believe it needs to implement regulations prior to a definitive court ruling that the provisions are unconstitutional; in those regulations, the Commission should at least attempt to make as small as possible an intolerable competitive advantage to certain speakers at the expense of unfavored speakers such as IFE.

Respectfully submitted,

  
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